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TSA Industries Sdn Bhd v Teoh Lai Kin & Ors

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HIGH COURT (SHAH ALAM) — CIVIL SUIT NO BA-22NCVC-89-02 OF 2017
SM KOMATHY J
4 JANUARY 2023

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Evidence — Burden of proof — Fraud and forgery — Plaintiff alleged that sum of money was unlawfully transferred out from its current account by way of forged letters of instructions — Whether plaintiff had proven its claim of fraud and forgery against first to fifth defendants

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Tort — Negligence — Banker and customer — Contractual duty — Plaintiff claimed sixth defendant made payment based on forged letters of instructions — Whether bank was negligent and/or had breached contractual/common law duties owed to plaintiff in honouring and paying on letters of instructions — Whether plaintiff was estopped from raising forgery/fraud by first defendant — Whether bank was entitled to rely on s 24 and s 73A of the Bills of Exchange Act 1949 — Whether plaintiff's action against bank was barred by Limitation Act 1953

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The plaintiff brought this suit against the defendants to recover a sum of RM31,935,688.60 that was allegedly unlawfully transferred from its current account. The plaintiff alleged that the sum was unlawfully transferred out by way of 79 forged letters of instructions ('LOIs'). The first defendant was employed by the plaintiff as an accountant executive; the second defendant, the first defendant's brother, was previously the sole proprietor of Entrust Marketing, a registered business; the third defendant was the first defendant's husband, the fourth defendant was the second defendant's wife; the fifth defendant was the first defendant's sister; and the sixth defendant was the bank where the plaintiff at all material times had maintained a current account number ('the current account'). It was the plaintiff's case that: (a) the first defendant as the accounts executive of the plaintiff had from 2009 to 2015 forged the signatures of its authorised signatories on the 79 LOIs to siphon off its monies in the current account over a seven-year period; and (b) the first defendant had conspired with the second to the fifth defendants to fraudulently siphon as well as to dissipate, conceal and/or wrongfully retain the monies. The plaintiff's case against the bank was for breach of contract and/or negligence and/or breach of common law duties and/or conversion in honouring and making payments on the 79 forged LOIs. The issues for consideration were: (i) whether the plaintiff had proven its claim of fraud and

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forgery against the first to fifth defendants; (ii) whether the bank was negligent and/or had breached the contractual/common law duties owed to the plaintiff in honouring and paying on the LOIs; (iii) whether the plaintiff was estopped from raising forgery/fraud by the first defendant; (iv) whether the bank was entitled to rely on ss 24 and 73A of the Bills of Exchange Act 1949; and (v) whether the plaintiff's action against the bank was barred by the Limitation Act 1953.

Held:

(1) It was only the defendants who could explain or refute the evidence against them and as to why they were in possession of monies that were unlawfully debited from the plaintiff's current account. They had chosen not to participate or give evidence to answer the prima facie case against them. The defendants' failure to give evidence was capable of giving and did in fact give rise to an adverse inference that the defendants had no innocent explanation for the prima facie case against them. The plaintiff had proven on a balance of probabilities that the signatures of its authorised signatories on the 79 LOIs had been forged, and the forgeries were committed by the first defendant. The first defendant had forged the signatures pursuant to a conspiracy with the second to fifth defendants to fraudulently siphon monies from the plaintiff's current account as well as to dissipate, conceal and/or wrongfully retain the monies. Accordingly, the plaintiff was allowed to enter judgment against the first to the fifth defendants (see paras 17 & 19–21).

(2) Visual inspection comparison was all that was called for. The bank was under no duty to take any further steps to investigate the genuineness of a signature which, on the face of it, purported to be the signature of the person named or described in the LOI. The duty of care contended for by the plaintiff represented an onerous and impractical burden on banks in the absence of suspicious circumstances. In carrying out the plaintiff's mandate, the bank did exercise reasonable care and skill in the checking and verification of each LOI. Therefore, the bank was not negligent and/or in breach of its contractual duty in verifying the signatures on the faxed LOIs without the originals or making verification calls. The letter of indemnity did not require such steps to be taken. The bank had acted in good faith and exercised all reasonable care in processing and approving the 79 LOIs (see paras 31 & 34–36).

(3) On the basis of the principle that a principal was liable for the fraud of his agent acting within the scope of his duty, whether the fraud was committed for the benefit of the principal or for the benefit of the agent, the first defendant's fraudulent knowledge and conduct was to be attributed to the plaintiff so as to preclude its claim against the bank (see para 57).

(4) By virtue of the contractual term requiring the plaintiff to check its statements, and by the plaintiff not having notified the bank of any inaccuracy or incorrect debit in the account within the time as required by that contract, the plaintiff was now precluded from claiming that the LOIs were forged. By failing to challenge the debits shown on the bank statements, the plaintiff had represented to the bank that the debits had been correctly made. The bank had acted in reliance upon the plaintiff's representations so made and continued to expose itself to the risk of paying out on forged LOIs. Accordingly, the banking contract provided a defence to the claim of the plaintiff (see paras 63–64).

(5) It was too late for the plaintiff to complain that it was not brought home to the plaintiff that by signing the letter of indemnity it was to take precautions in the general course of carrying on its business to prevent forgeries on the part of its employees. The letter of indemnity was clear and unambiguous and provided that the bank was authorised and directed to act on LOIs received by fax from the plaintiff without enquiry as to the authority or identity of the person giving or purporting to give the LOIs. There was no basis to impose a duty on the bank to advise the plaintiff to seek legal advice upon something which the plaintiff had requested and wanted the bank to do. It was unreasonable on the plaintiff's part to renege on its undertaking and seek to absolve itself from the consequences of not performing what it had agreed to do. The letter of indemnity was valid and an enforceable contract exonerating the bank from liability for the plaintiff's losses (see paras 70–71 & 76).

(6) The 79 LOIs were not unconditional orders as they were all subject to the conditions in the letter of indemnity, and as such the Bills of Exchange Act 1949 would not apply. The letter of indemnity expressly provided that the LOIs were payable at the discretion of the bank (see para 79).

(7) As the fraud was not committed by the bank or any agent of the bank, the plaintiff's reliance on s 29(1)(b) of the Limitation Act 1953 was misconceived. The plaintiff as the party seeking to postpone the limitation period had failed to satisfy the requirement under s 29 of the Limitation Act 1953 that it could not have discovered the fraud by the exercise of reasonable diligence. Therefore, the plaintiff's claim was dismissed (see paras 83–85).

[Bahasa Malaysia summary

Plaintif membawa saman ini terhadap defendan untuk mendapatkan semula sejumlah RM31,935,688.60 yang didakwa telah dipindahkan secara tidak sah daripada akaun semasanya. Plaintif mendakwa bahawa jumlah wang itu dipindahkan secara tidak sah melalui 79 surat arahan palsu ('LOI'). Defendan pertama telah diambil bekerja oleh plaintif sebagai eksekutif akauntan; defendan kedua, abang defendan pertama, sebelum ini merupakan pemilik

A tunggal Entrust Marketing, satu perniagaan berdaftar; defendan ketiga ialah suami defendan pertama, defendan keempat ialah isteri defendan kedua; defendan kelima ialah adik perempuan defendan pertama; dan defendan keenam ialah bank di mana plaintif pada setiap masa penting telah mengekalkan nombor akaun semasa ('akaun semasa'). Adalah menjadi kes B plaintif bahawa: (a) defendan pertama sebagai eksekutif akaun plaintif telah memalsukan tandatangan penandatangan yang diberi kuasa pada 79 LOI untuk menyalurkan wangnya dalam akaun semasa dalam tempoh tujuh tahun; dan (b) defendan pertama telah berpakat dengan defendan kedua hingga kelima untuk menyalurkan secara penipuan serta melesapkan, C menyembunyikan dan/atau menyimpan wang secara salah. Kes plaintif terhadap bank adalah untuk pelanggaran kontrak dan/atau kecuaian dan/atau pelanggaran kewajipan undang-undang awam dan/atau penukaran dalam menghormati dan membuat pembayaran ke atas 79 LOI palsu. Isu-isu untuk pertimbangan adalah: (i) sama ada plaintif telah membuktikan tuntutan D penipuan dan pemalsuannya terhadap defendan pertama hingga kelima; (ii) sama ada bank cuai dan/atau telah melanggar kewajipan kontrak/undang-undang awam yang terhutang kepada plaintif dalam menghormati dan membayar LOI; (iii) sama ada plaintif telah dihalang daripada membangkitkan pemalsuan/penipuan oleh defendan pertama; (iv) E sama ada bank berhak untuk bergantung pada ss 24 dan 73A Akta Bil Pertukaran 1949; dan (v) sama ada tindakan plaintif terhadap bank telah dihalang oleh Akta Had Masa 1953.

Diputuskan:

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(1) Hanya defendan yang boleh menjelaskan atau menafikan keterangan terhadap mereka dan mengapa mereka memiliki wang yang didebitkan secara tidak sah daripada akaun semasa plaintif. Mereka telah memilih untuk tidak mengambil bahagian atau memberi keterangan untuk G menjawab kes prima facie terhadap mereka. Kegagalan defendan untuk memberikan keterangan mampu memberi dan sebenarnya telah menimbulkan anggapan bertentangan bahawa defendan tidak mempunyai penjelasan yang tidak bersalah untuk kes prima facie terhadap mereka. Plaintif telah membuktikan pada imbangan H kebarangkalian bahawa tandatangan penandatangan yang diberi kuasa pada 79 LOI telah dipalsukan, dan pemalsuan dilakukan oleh defendan pertama. Defendan pertama telah memalsukan tandatangan menurut konspirasi dengan defendan kedua hingga kelima untuk menyalurkan wang secara penipuan daripada akaun semasa plaintif serta untuk I menghilangkan, menyembunyikan dan/atau menyimpan wang secara salah. Sehubungan itu, plaintif dibenarkan membuat penghakiman terhadap defendan pertama hingga kelima (lihat perenggan 17 & 19–21).

(2) Perbandingan pemeriksaan visual adalah semua yang diperlukan. Bank

tidak bertanggungjawab untuk mengambil sebarang langkah lanjut untuk menyiasat ketulenan tandatangan yang, pada hakikatnya, dikatakan sebagai tandatangan orang yang dinamakan atau diterangkan dalam LOI. Kewajipan penjagaan yang ditegaskan oleh plaintif mewakili beban yang membebankan dan tidak praktikal ke atas bank sekiranya tiada keadaan yang mencurigakan. Dalam melaksanakan mandat plaintif, bank telah menjalankan penjagaan dan kemahiran yang munasabah dalam penyemakan dan pengesahan setiap LOI. Oleh itu, bank tidak cuai dan/atau melanggar kewajipan kontraknya dalam mengesahkan tandatangan pada LOI yang difakskan tanpa dokumen asal atau membuat panggilan pengesahan. Surat indemniti tidak memerlukan langkah sedemikian diambil. Bank telah bertindak dengan niat baik dan melaksanakan semua penjagaan yang munasabah dalam memproses dan meluluskan 79 LOI (lihat perenggan 31 & 34–36).

(3) Berdasarkan prinsip bahawa prinsipal bertanggungjawab atas penipuan ejennya yang bertindak dalam skop tugasnya, sama ada penipuan itu dilakukan untuk faedah prinsipal atau untuk faedah ejen, pengetahuan dan kelakuan penipuan defendan pertama harus dikaitkan dengan plaintif untuk menghalang tuntutannya terhadap bank (lihat perenggan 57).

(4) Berdasarkan terma kontrak yang menghendaki plaintif menyemak penyatanya, dan dengan plaintif yang tidak memberitahu bank tentang apa-apa ketidaktepatan atau debit yang salah dalam akaun dalam masa yang dikehendaki oleh kontrak itu, plaintif kini telah dihalang daripada mendakwa bahawa LOI telah dipalsukan. Dengan gagal mencabar debit yang ditunjukkan pada penyata bank, plaintif telah menyatakan kepada bank bahawa debit telah dibuat dengan betul. Bank telah bertindak bergantung pada representasi plaintif dan terus mendedahkan dirinya kepada risiko membayar dengan LOI palsu. Sehubungan itu, kontrak perbankan memberikan pembelaan kepada tuntutan plaintif (lihat perenggan 63–64).

(5) Sudah terlambat untuk plaintif mengadu bahawa ia tidak dijelaskan kepada plaintif bahawa dengan menandatangani surat indemniti ia adalah untuk mengambil langkah berjaga-jaga dalam menjalankan perniagaannya untuk mengelakkan pemalsuan di pihak pekerjanya. Surat indemniti adalah jelas dan nyata dan menyatakan bahawa bank diberi kuasa dan diarahkan untuk bertindak ke atas LOI yang diterima melalui faks daripada plaintif tanpa pertanyaan tentang kuasa atau identiti orang yang memberi atau dikatakan memberi LOI. Tiada asas untuk mengenakan kewajipan ke atas bank untuk menasihati plaintif supaya mendapatkan nasihat undang-undang mengenai sesuatu yang plaintif telah minta dan mahu bank lakukan. Adalah tidak munasabah di pihak plaintif untuk mengingkari akujanjinya dan berusaha untuk

membebaskan dirinya daripada akibat tidak melaksanakan apa yang telah dipersetujuinya untuk dilakukan. Surat indemniti adalah sah dan kontrak yang boleh dikuatkuasakan yang membebaskan bank daripada liabiliti bagi kerugian plaintif (lihat perenggan 70–71 & 76).

(6) 79 LOI bukanlah perintah tanpa syarat kerana kesemuanya tertakluk kepada syarat dalam surat indemniti, dan oleh itu Akta Bil Pertukaran 1949 tidak akan terpakai. Surat indemniti dengan jelas menyatakan bahawa LOI perlu dibayar mengikut budi bicara bank (lihat perenggan 79).

(7) Memandangkan penipuan itu tidak dilakukan oleh bank atau mana-mana ejen bank, pergantungan plaintif pada s 29(1)(b) Akta Had Masa 1953 telah disalah anggap. Plaintif sebagai pihak yang ingin menangguhkan tempoh had masa telah gagal untuk memenuhi keperluan di bawah s 29 Akta Had Masa 1953 bahawa ia tidak dapat mengetahui penipuan dengan menjalankan usaha yang munasabah. Oleh itu, tuntutan plaintif telah ditolak (lihat perenggan 83–85).]

Cases referred to

Abdul Rahman Hamid v Perdana Merchant [2005] 5 MLJ 1, FC (refd)
Abu Bakar bin Ismail v Ismail bin Husin & Ors [2007] 4 MLJ 489, CA (refd)
Barclays Bank Plc v Quincecare Ltd and Another [1992] 4 All ER 363, QBD (refd)
Bilta (UK) Ltd (in liquidation) and others v Nazir and others (No 2) [2016] AC 1, SC (refd)
CGU Insurance Bhd v Asean Security Paper Mills Sdn Bhd [2006] 3 MLJ 1, CA (refd)
CIMB Bank Bhd v Anthony Lawrence Bourke & Anor [2018] MLJU 1864, CA (refd)
CIMB Bank Bhd v Panaron Control Sdn Bhd [2014] MLJU 1924; [2015] 2 MLRA 667, CA (refd)
Greenwood (Pauper) v Martins Bank Ltd [1933] AC 51, HL (refd)
Lee Cheong Chee v HSBC Bank Malaysia Bhd [2021] MLJU 574, HC (refd)
Lin Kai Wing & Anor v Lin Kai Lam & Ors [2016] 4 MLJ 372, CA (refd)
Lipkin Gorman (a firm) v Karpnale Ltd [1992] 4 All ER 331, KBD (refd)
Lloyd (Pauper) v Grace, Smith & Co [1912] AC 716, HL (refd)
London Joint Stock Bank Ltd v Macmillan & Arthur [1918] AC 777, HL (refd)
Maybank Islamic Berhad v Aldwich Enviro Management Sdn Bhd [2015] MLJU 1977, HC (refd)
Meridian Global Funds Management Asia Ltd v Securities Commission [1995] 2 AC 500, PC (refd)
Nathan v Dollars & Sense Ltd [2009] 1 LRC 496, SC (refd)
Public Bank v Exporaya Sdn Bhd [2013] 1 MLJ 507, CA (refd)
Singularis Holdings Ltd (in liquidation) v Daiwa Capital Markets Europe Ltd [2020] 1 All ER 383, SC (refd)

Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd [1986] 1 AC 80, PC (refd)
Takako Sakao (P) v Ng Pek Yuen and Anor [2009] 6 MLJ 75, FC (folld)
United Asian Bank Bhd v Tai Soon Heng Construction Sdn Bhd [1993] 1 MLJ 182, SC (refd)

Legislation referred to

Bills of Exchange Act 1949 ss 3, 24, 73A
Contracts Act 1950 s 29
Limitation Act 1953 ss 6, 29, 29(1)(b)

James Khong (with Edwin Lim) (James Khong) for the plaintiff.
Teoh Lai Kin representing himself for the first defendant.
Rabindra S Nathan (with Sathya Kumardas, Yvonne Chong Yun Xin and Mohd Daud Sulaiman) (Shearn Delamore & Co) for the sixth defendant.

SM Komathy J:

INTRODUCTION

[1] The plaintiff has brought this suit against the six defendants to recover a sum of RM31,935,688.60 that was allegedly unlawfully transferred from its current account between 2009 to 2015. The plaintiff alleges that the sum was unlawfully transferred out by way of 79 forged letters of instructions ('LOIs').

THE PARTIES

[2] The six defendants in this suit are as follows:

(a) the first defendant who was employed by the plaintiff as an accountant executive between 2003 and 2016;

(b) the second defendant, the first defendant's brother was previously the sole proprietor of Entrust Marketing, a registered business;

(c) the third defendant is the first defendant's husband;

(d) the fourth defendant is the second defendant's wife;

(e) the fifth defendant is the first defendant's sister; and

(f) the sixth defendant is Standard Chartered Bank ('the bank') where the plaintiff at all material times had maintained a current account number ('the current account').

Claim against D1 to D5

[3] It is the plaintiff's case that first defendant had forged the signatures of its

authorised signatories on the 79 LOIs to siphon off its monies in the current account over a seven year period. It is also the plaintiff's case that the first defendant had conspired with the second to the fifth defendants to fraudulently siphon as well as to dissipate, conceal and/or wrongfully retain the monies.

[4] The plaintiff made the following averments in its statement of claim against the first to fifth defendants:

(a) during the tenure of the first defendant as the accounts executive of the plaintiff, she had from 2009–2015 without the authorisation, knowledge and/or consent of the plaintiff, fraudulently issued and/or caused to be issued the 79 LOIs to the bank for the wrongful purpose of disbursement of funds from the current account to the bank account of Entrust Marketing and/or the second defendant without any basis, commercial or otherwise;

(b) such monies were thereafter transferred and/or paid out by second defendant to the first to fifth defendants;

(c) in issuing and/or causing the issuance of the said written instructions, the first defendant had forged and/or caused to be copied/superimposed onto the LOIs the signatures of the plaintiff's authorized signatories without their knowledge and/or consent;

(d) the first defendant had also made false entries in the accounts, books and records of the plaintiff in order to conceal from the plaintiff such fraudulent payments from the current account to entrust marketing and/or the second defendant;

(e) the first defendant had at all material times further caused the plaintiff to service and make payments towards the current account using funds from the plaintiff's other bank accounts in perpetuation of the fraud;

(f) in addition, the first defendant removed from the plaintiff's records and/or destroyed the bank statements of the sixth defendant pertaining to the current account to conceal the real status of the current acount and her actions from the plaintiff at all material times;

(g) by reason of the foregoing, the first to fifth defendants had committed fraud and/or deceit against the plaintiff. Further, the first to fifth defendant had knowingly and/or dishonestly assisted the first defendant in the commission of the fraud and deceit. Further and/or in the alternative, the first to fifth defendants were in wrongful receipt of the monies of the plaintiff and/or that the first to fifth defendant had and received the said monies of the plaintiff;

(h) further the first to fifth defendants had collectively and with one mind, conspired to injure the plaintiff by way of unlawful means for unlawful purpose. The particulars of which are as follows:

(i) the first to fifth defendant had a common intention to siphon and dissipate the monies from the plaintiff's current account for their own benefit and/or for the benefit of anyone of them;

(ii) in so doing, the first defendant, being an employee of the plaintiff and conducting the day to day handling and managing of the current account had forged LIOs and forged and/or caused to be copied/superimposed onto the LOIs the signature of the plaintiff's authorised signatories without their knowledge and/or consent;

(iii) the LOIs were fraudulently issued and/or caused to be issued to the bank for the purpose of disbursement of funds from the current account to the bank account of Entrust Marketing and/or the second defendant without any basis, whether commercial or otherwise;

(iv) the second defendant had knowingly received such monies without any basis, whether commercial or otherwise as the second defendant had no business dealings with the plaintiff. In the alternative, the second defendant had allowed the use of his aforesaid bank account in the siphoning and dissipation of the plaintiff's monies;

(v) the second defendant had then disbursed the said monies in its aforesaid bank account to the other defendants including himself (first to fifth defendants) either by way of cash or bank transaction;

(vi) the first to fifth defendants had received the monies of the plaintiff with the full knowledge that the monies belonged to the plaintiff and knowing that they had no basis to do so. They received such monies purely for their own benefit and to the detriment of the plaintiff. At all material times, none of them had the intention to return the said monies to the plaintiff and this remains so to date;

(vii) the first to fifth defendants then sought to conceal from the plaintiff the aforesaid wrongful actions and continue to do so to date;

(viii) such monies siphoned and dissipated by the first to fifth defendants have been converted; and

(ix) by reason of the foregoing, the plaintiff has suffered loss and damage

[5] By their joint defence, the first to fifth defendants denied the claims and allegations against them.

CLAIM AGAINST THE BANK

[6] The plaintiff's case against the bank is for breach of contract and/or negligence and/or breach of common law duties and/or conversion in honouring and making payments on the 79 forged LOIs.

Trial

[7] The trial took place over a period of 23 days. The second, fourth and fifth defendants chose not to attend or participate in the trial. The first and third defendants, who were then serving prison sentences, after attending a few days of trial, informed the court that they wished to be excused from further attending court.

[8] The plaintiff and the bank called eight and ten witnesses, respectively. All were witnesses of facts except for PW5, a handwriting expert. The bank did not call any expert witness though in its defence, it denied the signatures were forgeries. In the course of the trial, the bank did not seriously challenge the evidence given by the plaintiff's authorised signatories and PW5 that the signatures on the 79 LOIs were forgeries.

[9] There was no other serious dispute on the facts. I will be considering the evidence of the witnesses in this judgment in relation to the issues to be decided.

ISSUES

[10] The issues before this court are as follows:

(a) whether plaintiff has proven its claim of fraud and forgery against the first to fifth defendants;

(b) whether the bank was negligent and/or had breached the contractual/common law duties owed to the plaintiff in honouring and paying on the LOIs;

(c) whether plaintiff is estopped from raising forgery/fraud by the first defendant;

(d) whether the plaintiff's action against the bank is barred by the Limitation Act 1953; and

(e) whether bank is entitled to rely on ss 24 and 73A of the Bills of Exchange Act 1949.

The undisputed facts

[11] The evidence led by the parties disclosed the following undisputed facts: A

(a) the plaintiff had a current account with the bank;

(b) RENTAS payments could be made from the said current account;

(c) instructions for RENTAS payments could be given through LOIs; B

(d) each LOI must have the signatures of the plaintiff's authorized signatories;

(e) the plaintiff executed a letter of indemnity dated 5 May 2016, for the purpose of enabling it to issue LOIs by way of facsimile to effect transfer of funds from the current account via RENTAS; C

(f) pursuant to the letter of indemnity, the plaintiff agreed:

(i) the bank does not owe any duty to the plaintiff to enquire into authority of the person giving or purporting to give the instructions; D

(ii) the bank does not owe any duty to plaintiff to enquire into the genuineness or authenticity of the instructions given by TSA by way of telephone, telex, facsimile, or any other form of electronic communication; and E

(iii) the bank is entitled to treat and rely upon the notice instructions or communication sent by the plaintiff as fully authorised and binding upon the plaintiff. F

(g) the plaintiff authorised the first defendant with the sole authority, amongst others, to:

(i) handle, manage and monitor the transactions of nine banks accounts of the plaintiff; G

(ii) prepare the LOIs and submit the same to the authorised signatories for execution; and

(iii) to submit the executed LOIs to the bank to effect payment. H

(h) the first defendant reported to PW3, the finance manager;

(i) for the period between 2009 to 2015, the plaintiff regularly faxed LOIs to the bank to authorise the bank to transfer funds from its current account via Rentas to the named beneficiarie for the amounts stipulated therein; I

(j) during the said period, the plaintiff accepted the following practices without any complaint:

(i) it did not require the bank to ask for the 'original' letters of

A instruction to be produced when processing LOIs delivered by way of fax; and

(ii) call backs were not required to be carried out by the bank in verifying the faxed LOIs.

B (k) the 79 LOIs, the subject matter of this action, were received by the bank by way of fax;

(l) between 2009 and 2005, a total sum of RM31,935,688.60 was debited from the plaintiff's current account and paid out to the second defendant C premised on the 79 LOIs;

(m) the second defendant had no dealings with the plaintiff nor was he a trade creditor;

(n) the bank staff had processed and approved the 79 LOIs after comparing D the authorised signatures on these documents with the specimen signatures given by the plaintiff. They did not ask for the original LOIs or make verification calls before verifying the signatures;

(o) following the transfer of funds effected in accordance with each LOI, the E bank issued payment advices to notify the plaintiff of the transfer of funds to the named beneficiaries. In addition, the bank also issued monthly statements of account to the plaintiff. Each statement contained a term requiring the plaintiff to notify bank of any discrepancies within a specified period of time failing which the transactions contained therein F would be considered as correct;

(p) the plaintiff discovered the discrepancies in its bank accounts in early 2016, and lodged police reports against the first defendant and its finance manager, PW3. The bank was also notified of the same;

G (q) during the period between 2009–2015, the first defendant was a trusted employee who was allowed by the plaintiff to work totally unsupervised and there were insufficient internal controls in the plaintiff; and

(r) the first and third defendants were subsequently charged and convicted H in respect of the 79 LOIs for, inter alia, cheating, criminal breach of trust and dishonestly inducing delivery of property. They are both currently serving their prison sentences.

[12] I turn now to deal with the plaintiff's claim against first to the fifth I defendants.

FRAUD AND FORGERY

[13] The plaintiff's claim against first to the fifth defendants is based on fraud and forgery. It is trite law that the burden of proving forgery and fraud is on the party alleging it.

[14] The four authorised signatories of the plaintiff's current account testified without challenge that they neither signed any of the 79 disputed LOIs nor knew anything of their existence nor authorised their issuance. Their evidence that the signatures on the LOIs did not belong to them is amply corroborated by the evidence of PW5, the plaintiff's handwriting expert who testified that having examined the signatures in the 79 LOIs with the specimen signatures provided by the authorised signatories, it was her opinion that the signatures of the authorised signatories in the LOIs were identical copies reproduced from a master document through either a mechanical or electrical copying and pasting technique.

[15] In addition, the plaintiff's managing director (PW1) gave evidence that when the discrepancies in the bank accounts was discovered, he had questioned the first defendant and she admitted to him that she had forged the signatures of the authorised signatories on the 79 LOIs.

[16] There is also undisputed evidence that all the 79 disputed LOIs had been made payable to the second defendant, who was the first defendant's brother. Next, and crucially, the evidence shows that after the monies had gone into the second defendant's account, he had transferred or paid out the monies to the first and third to fifth defendants. The plaintiff had never had any business or any sort of dealings with the second defendant and the others.

[17] It is only the defendants who can explain or refute the evidence against them and as to why they were in possession of monies that were unlawfully debited from the plaintiff's current account. They have chosen not to participate or give evidence to answer the prima facie case against them. They have offered no explanation for their absence or silence. In the result, the court is left with only the plaintiff's version of the facts.

[18] What then is the effect of the defendants failure to give evidence. The Federal Court in *Takako Sakao (P) v Ng Pek Yuen and Anor* [2009] 6 MLJ 75 explained:

> ... it is significant that in the present instance the first respondent did not attend court nor give evidence nor take any part in the case. All she did was merely to put forward arguments on why the appellant's caveat ought to be removed. She could have, if she wished, given evidence and challenged the appellant's evidence. But as already noted she refrained from doing that. ... The appellant took the witness stand

> and gave her evidence on the terms of the arrangement and about the sums of money she had provided and the purpose for which they were provided. No evidence was called on the part of the first respondent to refute the appellant's testimony. Such an important omission was missed by both courts below ...
>
> In the present instance, there is no doubt that the first respondent had intimate knowledge of the material facts relevant to the dispute and that she was privy to the several steps through which the transaction had proceeded. Based on the authorities already cited, it is patently clear that the trial judge in the present case ought to have held that the failure of the first respondent to give evidence apart from discrediting her case strengthened the appellant's case on those vital points that lay at the axis of the dispute between the parties. This, the trial judge clearly omitted to do. Instead, he treated the first respondent's failure to appear and give evidence as a matter of no apparent consequence.

[19] Applying the Federal Court's observations here, the defendants failure to give evidence was capable of giving, and did in fact give rise to an adverse inference that the defendants have no innocent explanation for the prima facie case against them.

[20] In the circumstances, I find that the plaintiff has proven on a balance of probabilities that the signatures of its authorised signatories on the 79 LOIs had been forged, and the forgeries were committed by the first defendant. I further find that the first defendant had forged the signatures pursuant to a conspiracy with the second to the fifth defendants to fraudulently siphon monies from the plaintiff's current account as well as to dissipate, conceal and/or wrongfully retain the monies.

[21] Accordingly, I allow the plaintiff to enter judgment against the first to the fifth defendants.

Liability of bank

[22] That brings me now to the plaintiff's claim against the bank. The plaintiff seeks the repayment of the monies paid out on the 79 forged LOIs against the bank on two bases, alleging: (a) tort of conversion; and (b) negligence and/or breach of contractual duty.

[23] I take first the plaintiff's claim in negligence and/or breach of contractual duty. The plaintiff's case is that the bank had been negligent in executing its duty in the processing and approval of the 79 LOIs. The plaintiff says the bank failed to detect the forgeries as it had processed and approved the faxed LOIs only by making a visual comparison of the signatures on the faxed LOIs with the specimen signatures provided by the plaintiff without requiring the production of the originals LOIs and/or make verification calls to the

plaintiff. The plaintiff says that as the bank was verifying signatures on faxed LOIs, it had a further duty to require the production of the originals LOIs and/or make verification calls before making processing and approving the same.

[24] The plaintiff further contends that notwithstanding the terms in the letter of indemnity which did not impose this further duty or obligation on the bank, this duty must be implied to ensure that its interest is protected and it is not exposed to unauthorised and/or fraudulent transactions.

[25] The bank disputes that it had a further duty as the plaintiff contends. It argues that the duties owed by it to the plaintiff in processing and approving the faxed LOIs, as recognised under common law and by contract was to treat the plaintiff's mandate (including the signatures of their authorised signatories) in the LOIs at face value and to exercise reasonable care and skill in complying with the plaintiff's mandate. In exercising reasonable care, the bank argues it was not obliged to perform enquiries, verification and/or authentication in relation to the authority of the person giving the instructions or the genuineness of the instructions. It points out that the specific duties and obligations owed by it to the plaintiff in relation to LOIs delivered by fax are set out in the letter of indemnity.

[26] The bank denies it was in breach of its duty care in processing and making payments on the faxed LOIs. It says that no obligation can be implied or imposed on it to make verification calls and/or require the production of the original LOIs when there was no reason to be suspicious of the faxed LOIs.

Whether bank owed a duty to request for original LOIs and make verification calls

[27] The relationship between the bank and its customer is contractual in nature and the bank does not owe any greater duty to the customer in tort, than that which is expressly or impliedly provided in the contract. The bank's duties in contract and tort are co extensive (see *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd* [1986] 1 AC 80 and *Lee Cheong Chee v HSBC Bank Malaysia Bhd* [2021] MLJU 574). By reason of their relationship as banker and customer, mutual duties of care are owed to each other.

[28] A bank has a duty to comply with the customer's mandate. In *Lipkin Gorman (a firm) v Karpnale Ltd* [1992] 4 All ER 331, it was held that that the contractual duties owed by a bank in in the context of an instruction to pay are:

(a) the bank is entitled to treat the customer's mandate at its face value save in extreme cases;

(b) the bank is not obliged to question any transaction which is in accordance with the mandate, unless a reasonable banker would have grounds for believing that the authorised signatories are misusing their authority for the purpose of defrauding their principal or otherwise defeating his true intention;

(c) it follows that if a bank does not have reasonable grounds for believing that there is fraud it must pay;

(d) mere suspicion or unease do not constitute reasonable grounds and are not enough to justify a bank in failing to act in accordance with a mandate; and

(e) a bank is not required to act as an amateur detective.

[29] In *Barclays Bank Plc v Quincecare Ltd and Another* [1992] 4 All ER, it was further held that it is an implied term of the contract between the bank and customer that the bank shall observe reasonable skill and care in executing a customer's instructions. The skill and care required on the bank is that a banker must refrain from executing and order if the banker is put on inquiry that he has reasonable grounds for believing that the order is an attempt to misappropriate the funds of the customer.

[30] The principles in *Lipkin* and *Quincecare* have been accepted and applied by the Federal Court in *Abdul Rahman Hamid v Perdana Merchant* [2005] 5 MLJ 1 and the Court of Appeal in *Public Bank v Exporaya Sdn Bhd* [2013] 1 MLJ 507.

[31] There is no gainsaying that forgeries of cheques and payment instructions are extremely difficult for a bank to detect. In the instant case, it is not in dispute that the bank had processed and approved the LOIs after a visual comparison of signatures on the LOIs against the specimen signatures. In the absence of any express agreement to the contrary, the bank's duty to execute the plaintiff's faxed LOIs was limited to *Lipkin* and *Quincecare* duties and the terms in the letter of indemnity. The bank thus had an obligation to examine the faxed LOIs with reasonable care to ascertain that they appeared on their face to be in accordance with the specimen signatures provided by the plaintiff. In my view, visual inspection comparison was all that was called for. The bank was under no duty to take any further steps to investigate the genuineness of a signature which, on the face of it, purported to be the signature of the person named or described in the letter of instruction.

[32] There is no dispute here that the signatures on the 79 LOIs were regular on their face in that the signatures of the authorised signatories contained in each LOL were similar to the specimen signatures of the plaintiff's authorised signatories, as admitted by the plaintiffs own witnesses and handwriting expert.

It is evident from the plaintiff's own handwriting expert, that the bank could not have detected that the signatures in each LOI was so identical, and this could have been discovered only by comparing the signatures in one LOI against another LOI. As there were significant gaps in time between each LOI, I agree with the bank's submission that it would not be practical to expect the bank to retrieve previous LOIs in order to compare with an LOI that it was then currently processing.

[33] I am unable to agree with the plaintiff that the fact that the bank was verifying signatures on faxed LOIs provides a basis to impose this further duty. If the plaintiff had considered the originals and verification calls important, then it was for the plaintiff to instruct the bank in writing. It is odd that the plaintiff is taking this position when the plaintiff did not throughout 2009 to 2015 deliver any of the original LOIs to the bank.

[34] In my view, the duty of care contended for by the plaintiff represents an onerous and impractical burden on banks in the absence of suspicious circumstances. To impose this duty in the present case would be to hold the bank to a higher standard than the standard of care expressed in *Quincecare*, which is that of the ordinary prudent banker

[35] On the evidence, I am satisfied that in carrying out the plaintiff's mandate, the bank did exercise reasonable care and skill in the checking and verification of each LOI, including signature verification of the authorised signatories as demonstrated by the markings or stamps made by its staff on the letters of instruction. The bank also took the precaution of sending payment advices to notify the plaintiff of the transfer of funds after each transfer, and monthly statements of account to show the transactions done in respect of the current account. Neither the payment advices nor the monthly statements were ever queried of any wrong debits or other errors.

[36] I therefore find that the bank was not negligent and/or in breach of its contractual duty in verifying the signatures on the faxed LOIs without the originals or making verification calls. The letter of indemnity did not require such steps to be taken. The bank had acted in good faith and exercised all reasonable care in processing and approving the 79 LOIs.

Tort of conversion

[37] Next, I turn to the plaintiff's claim based on conversion. In *United Asian Bank Bhd v Tai Soon Heng Construction Sdn Bhd* [1993] 1 MLJ 182, the Supreme Court made these observations:

> 'n our judgment, a customer who alleges that his banker honoured forged cheques drawn on his account need only establish the charge of forgery on a balance of

> probabilities ... It is an established principle that the liability of a bank for making payment on forged instruments of its customer is founded on the tort of conversion. That is a tort of strict liability... Therefore, at common law a banker who pays out on a forged instrument drawn on his customer's account is absolutely liable to make good the loss. It is no answer for him to say that he was unaware of the forgery or that he took reasonable care. The forged instrument is a nullity and a banker has no authority, actual or implied, from his customer to act upon it. The common law has been codified in s 24 of the Bills of Exchange Act 1949 which creates a limited exception in favour of a banker ... Section 24 protects a banker by recourse to the doctrine of estoppel. A customer cannot recover if he has represented to his banker that the forged signature is effective and that the instrument is accordingly good for payment ...

[38] As I have found that the signatures on the 79 LOIs were forgeries, this means that the bank had no mandate to make payment on the 79 forged LOIs, and as it has made payments, it would be liable to the plaintiff unless the plaintiff by agreement or conduct is estopped from raising the forgeries. It is the bank that bears the onus of establishing such an estoppel precluding the plaintiff from making claim for the return of the monies paid out under the forged LOIs.

Estoppel

[39] The bank says that the plaintiff is estopped from relying on the forgeries to invalidate the LOIs and the mandate contained therein on these grounds:

(a) first defendant's actions is attributable to the plaintiff by way of agency;

(b) estoppel by way of plaintiff's conduct;

(c) estoppel by way of plaintiff's representation; and

(d) the plaintiff facilitated and/or contributed to the fraudulent acts of the first defendant.

Whether first defendant's actions are attributable to the plaintiff

[40] This issue has to do with whether the knowledge and fraudulent actions of the first defendant can be attributed to the plaintiff.

[41] A company, unlike an individual, has no mind or body of its own and can only act through natural persons. As such, attribution rules serve to determine when and which natural person's acts and thoughts are to be treated as the company's own. Each case depends on its own facts, and the relevant inquiry, therefore, is whether the acts of the principal constitute a representation that the agent had a particular authority and were reasonably so understood by the third party. The subject of attribution was succinctly

articulated by Lord Hoffmann in *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500 at p 506:

> Any proposition about a company necessarily involves a reference to a set of *rules*. *A company exists because there is a rule (usually in a statute) which says that a persona ficta shall be deemed to exist and to have certain of the powers, rights and duties of a natural person. But there would be little sense in deeming such a persona ficta to exist unless there were also rules to tell one what acts were to count as acts of the company. It is therefore a necessary part of corporate personality that there should be rules by which acts are attributed to the company. These may be called 'the rules of attribution.*

[42] Lord Hoffmann went on to identify three distinct rules of attribution:

> First, there are primary rules of attribution, which will generally be found in a company's constitution, typically its articles of association. There are also primary rules of attribution that are not expressly stated in the articles but are implied by company law;
>
> Second, general rules of attribution (which are equally available to natural persons), comprising the principles of agency which allow for liability in contract for the acts done by other persons within their actual or ostensible scope of authority, and vicarious liability in tort.
>
> Thirdly, 'special rules of attribution' fashioned by the court in situations where a 'rule of law, either expressly or by implication, excludes the attribution on the basis of the general principles of agency or vicarious liability.

[43] With regard to the general rules of attribution, in *CGU Insurance Bhd v Asean Security Paper Mills Sdn Bhd* [2006] 3 MLJ 1 Gopal Sri Ram JCA explained at para 113:

> This is not an exceptional case. And we are of the view that the general principles of agency and vicarious liability are sufficient, on the facts of this case, to determine the point under discussion. As a general rule, the acts and omissions of a servant or agent of a natural person are attributed to that person when those acts are done in the course of employment. When operating in the sphere of the law of contract this is called the doctrine of agency and when operating in the sphere of tort law it is known as the doctrine of vicarious liability.

[44] A company can therefore be attributed with the knowledge or actions of a fraudulent employee or agent, if the employee or agent was acting within his ostensible or actual authority (see *Lloyd (Pauper) v Grace, Smith & Co* [1912] AC 716 and *Abu Bakar bin Ismail v Ismail Bin Husin & Ors* [2007] 4 MLJ 489 (CA)). The underlying basis of ostensible authority is that a third party can, in certain situations, assume that an agent has authority, regardless of whether the principal has in fact granted such authority.

[45] Coming back to the instant case, in determining whether the first defendant's knowledge and actions ought to be attributed to the plaintiff, 'the

general rules of attribution' apply. The first defendant was entrusted and authorised by the plaintiff to prepare the LOIs, and fax them to the bank upon securing the signatures of the authorised signatories. The first defendant faxed the forged 79 LOIs which purported to have been signed by the authorised signatories to the bank. She knew that they had not signed them. The plaintiff does not dispute the first defendant's authority to fax the LOIs to the bank.

[46] The only issue here is whether the first defendant's fraudulent conduct and knowledge is to be attributed to the plaintiff.

[47] The bank strongly relies on the decisions of the New Zealand Supreme Court in *Nathan v Dollars & Sense Ltd* [2009] 1 LRC 496 and *Maybank Islamic Berhad v Aldwich Enviro Management Sdn Bhd* [2015] MLJU 1977 to contend that the first defendant's fraudulent conduct and knowledge ought to be attributed to the plaintiff. On the other hand, the plaintiff submits that the rules of attribution do not apply where the company is an innocent victim of a fraud perpetuated by its director and/or employee. It relies strongly on the decision of the English Supreme Court in *Singularis Holdings Ltd (in liquidation) v Daiwa Capital Markets Europe Ltd* [2020] 1 All ER 383.

[48] In view of the positions taken by the parties, it behoves me to examine the decisions in *Nathan v Dollars* and *Singularis Holdings Ltd*.

[49] In *Nathan v Dollars*, the facts can be briefly stated. The appellant, D & S, agreed to make a loan to R to assist him to purchase shares in a business. One of the conditions of loan was that R's parents provided security for R's liability to repay that loan by executing a memorandum of mortgage to D & S over their jointly owned residential property. The solicitor for D & S, T, arranged delivery to R of a package containing the documents for his parents to sign. R procured his father's signature on the documents but he forged the signature of his mother. When R did not meet his repayment obligations, D & S sought to exercise its power of sale and R's parents resisted on the ground that R had forged her signature.

[50] The New Zealand Supreme Court held that in view of the engagement of R by D & S, through T, to get the mortgage signed and then witnessed, it would be artificial and commercially unrealistic to take the view that there was no relevant element of agency in what R did. It was said that as R had been entrusted with the task, on behalf of D & S, of obtaining the signatures. D & S had implicitly authorised him to represent it in its dealings with his parents concerning their signature of the documents. R was therefore D & S's agent for that purpose. It was further held that as R was acting in the course of an agency

for D & S when he committed the forgery, his fraud in doing so was be treated as the fraud of D & S regardless of the absence of any knowledge of the fraud by D & S or T.

[51] I now turn to deal with the facts in the *Singularis* case. There, Singularis (the company) was wholly owned by a Saudi Arabian businessman, Mr Al Sanea, he was its sole shareholder, a director and also its chairman, president and treasurer. There were six other directors who did not exercise any influence over the management of the company. Very extensive powers were delegated to Mr Al Sanea to take decisions on behalf of the company, including signing powers over the company's bank account. On Mr Al Sanea's instructions, the defendant bank paid out funds in the company's account to entities with which the former was associated. The company, through its liquidators, sought recovery of the money, alleging that the bank had breached its duties. The bank argued that as the company's instructions were given by the company's Chairman and sole share-holder, Mr Al Sanea's fraud ought to be attributed to the company so as preclude it from bringing this claim against it, even if it was negligent.

[52] The trial judge allowed the claim against the bank. It was held that Mr Al Sanea's fraudulent knowledge and conduct could not be attributed to the company so as to bar its claim as the bank had breached its duty of care in making payments without proper inquiry. She found that any reasonable banker would have realised that there were many obvious, even glaring, signs that Mr Al Sanea was perpetrating a fraud on the company and should have suspended payment until it had made reasonable enquiries to satisfy itself that the payments were properly to be made. The bank was held to have breached its *Quincecare* duty on the facts. The bank did not dispute this finding.

[53] It unsuccessfully appealed to the Court of Appeal and Supreme Court Lady Hale, in giving the unanimous judgment of the Supreme Court, held at paras 34–35 and 39:

> But in any event, in my view, the judge was correct also to say that 'there is no principle of law that in any proceedings where the company is suing a third party for breach of duty owed to it by that third party, the fraudulent conduct of a director is to be attributed to the company if it is a one-man company'. In her view, what emerged from Bilta was that 'the answer to any question whether to attribute the knowledge of the fraudulent director to the company is always to be found in consideration of the context and the purpose for which the attribution is relevant' (para 182). I agree and, if that is the guiding principle, then *Stone & Rolls* can finally be laid to rest.
>
> The context of this case is the breach by the company's investment bank and broker of its *Quincecare* duty of care towards the company. The purpose of that duty is to protect the company against just the sort of misappropriation of its funds as took place here. By definition, this is done by a trusted agent of the company who is

A authorized to withdraw its money from its account. To attribute the fraud of that person to the company would be, as the judge put it, to 'denude the duty of any value in cases where it is most needed' (para 184). If the appellant's argument were to be accepted in a case such as this, there would in reality be no *Quincecare* duty of care or its breach would cease to have consequences. This would be a retrograde step.

B ...

In reaching this conclusion in such short order, I mean no disrespect to the lengthy arguments of counsel or to the impressive judgments in the courts below. But Mr Crow was correct to say that this case is bristling with simplicity. A company with a substantial business traded for some years and ran up debts in doing so. It also had
C a substantial sum of money standing to its credits, as a result of its legitimate business activities, with its broker-bankers. When it appeared that the company was running into difficulties, its 'directing mind and sole shareholder fraudulently deprived the company of that money by directing Daiwa to pay it away. Daiwa should have realised that something suspicious was going on and suspended
D payment until it had made reasonable enquiries to satisfy itself that the payments were properly to be made. The company (and through the company its creditors) has been the victim of Daiwa's negligence.

[54] Having examined the decision in Singaluris, I am unable to agree with
E the plaintiff that the case is authority for the proposition that where a company is the victim of wrongdoing by its agent, that wrongdoing or knowledge of the agent cannot be attributed to the company. In my view, it is clear from the dictum of Lady Hale, that the Supreme Court did not attribute Mr Al Sena's fraudulent conduct to the company as the bank was in breach of its duty of care
F to the company in failing to make enquiries when there were glaring signs he was perpetrating a fraud on the company. It found that the bank had no defence to the claim brought by the company as it was the bank's breach that caused the loss, and not Mr Al Sena's dishonesty.

G **[55]** This is not the case here. The bank is an innocent party here. It had no reason to suspect that the 79 LOIs were forgeries. As against an innocent party, the principal will not be treated as a victim of the wrongdoing but as one of the perpetrators. This is illustrated by the decision of the House of Lords in *Lloyd (Pauper) v Grace, Smith & Co* [1912] AC 716. In which a firm of solicitors was
H held liable for frauds covertly committed against a client by their managing clerk for his own benefit entirely. The firm had gained nothing from the frauds. The House of Lords rejected the argument that a principal was not liable for the fraud of his agent unless committed for the benefit of the principal.

I **[56]** The authorities held that the only cases where the employer has escaped liability for the fraud or forgery of its employee were situations where the court found as a fact that the employee had acted outside the acts that he was engaged to perform. They further show that if the actions of the forger come within the scope of authority, the doctrine will apply and bind the defaulter's employer.

There are only a few exceptions to this principle that in law a principal is liable for the fraud of his agent. For instance, directors and employees cannot rely on their fraudulent conduct as a defence to a claim brought against them by their corporate employer (see *Bilta (UK) Ltd (in liquidation) and others v Nazir and others (No 2)* [2016] AC 1).

[57] I therefore find on the basis of the principle that a principal is liable for the fraud of his agent acting within the scope of his duty, whether the fraud was committed for the benefit of the principal or for the benefit of the agent, the first defendant's fraudulent knowledge and conduct is to be attributed to the plaintiff so as to preclude its claim against the bank.

Estoppel by way of plaintiff's conduct

[58] The bank next contends that the plaintiff is estopped from alleging that the 79 LOIs are forged. It says that this estoppel is created by the failure of the plaintiff to comply with its contractual duty to notify it of any discrepancies in the monthly bank statements issued to it. The bank says that it was this breach that led to the bank paying out the funds without a mandate from its customer.

[59] In *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd* [1986] 1 AC 80, the Privy Council held that in the absence of any express agreement to the contrary, a customer owes the following limited duties of care to the bank in the operation of his account with the bank, namely:

(a) a duty to refrain from drawing a payment order or instruction in such a manner as to facilitate fraud or forgery; *London Joint Stock Bank Ltd v Macmillan & Arthur* [1918] AC 777;

(b) a duty to inform the bank of any forgery or unauthorized drawing of cheques as soon as he becomes aware of it: *Greenwood (Pauper) v Martins Bank Ltd.* [1933] AC 51; and

(c) a customer, in the absence of express agreement, does not owe a duty of care to his bank to prevent forgery of his cheques and is not under a duty to check his bank statements.

[60] The Malaysian Supreme Court in *United Asian Bank Bhd v Tai Soon Heng Construction Sdn Bhd* [1993] 1 MLJ 182 adopted the view in *Tai Hing Cotton Mill Ltd* that at common law a customer owes only two duties to the bank, and that banks may rely on contract to modify or improve upon their common law position.

[61] The two decisions recognise that banks can therefore expressly stipulate by contract a duty on the part of its customers to verify monthly statements of account furnished by a bank to its customers periodically, and to provide for

such statements to be conclusive against its customers as regards their accuracy in the absence of any notification by the customers to the contrary. When banks incorporate this clause in the contracts, the common law duties of a customer will become subordinate to the contractual terms.

[62] Coming back to the instant case. The bank has entered into a banking contract with the plaintiff. By this contract the bank had expressly imposed on the plaintiff the obligation to verify its monthly statements of accounts and to notify the banks of debits wrongly made or incorrect entries in the accounts within a given time failing which the statements are considered as accurate. It is not in dispute that every month the bank sent to the plaintiff a statement of account of the previous month of the LOIs which had been cleared and paid by the bank so as to enable the plaintiff to verify their statement of account against those LOIs. The monthly bank statements also carried an endorsement to the effect that the statements would be deemed accurate if bank was not notified of any discrepancies. It is common ground that no discrepancies were raised by the plaintiff within the stipulated timeline to dispute any of the transactions reflected in the monthly statements.

[63] I accept the bank's contention that by virtue of the contractual term requiring the plaintiff to check its statements, and by the plaintiff not having notified the bank of any inaccuracy or incorrect debit in the account within the time as required by that contract, the plaintiff is now precluded from claiming that the LOIs were forged. By failing to challenge the debits shown on the bank statements, the plaintiff had represented to the bank that the debits had been correctly made. The bank had acted in reliance upon the plaintiff's representations so made and continued to expose itself to the risk of paying out on forged LOIs.

[64] Accordingly, I find that the banking contract provides a defence to the claim of the plaintiff.

Estoppel by way of plaintiff's representation

[65] The bank next contends that the letter of indemnity precludes the plaintiff from alleging that the 79 LOIs are forged. It says that it had agreed to act upon LOIs received by fax from the plaintiff on the basis of representations the plaintiff had made in the letter of indemnity, namely:

(a) the bank is entitled to act upon the LOIs received via fax without further inquiry and to treat the same as fully authorised and binding upon the plaintiff and to effect the payments; and

(b) the plaintiff would indemnify the bank of any loss, damages, expenses and other liabilities whatsoever incurred as a consequence of the banks action in accepting and acting upon such instructions.

[66] The bank argues that in reliance upon these representations, it had in good faith proceeded to honour and make payment on the 79 LOIs, which it would not have otherwise done. It adds that as such, the plaintiff cannot now dispute the validity of the forged LOIs.

[67] The plaintiff, on the other hand, argues that the letter of indemnity does not preclude it from raising the issue of forgeries on the 79 LOIs for the following reasons:

(a) a plain reading of the letter of indemnity as a whole demonstrates that it is intended for the indemnification of the bank against third-party claims which may arise as a result of the bank relying and acting upon communications received from the plaintiff. It does not exclude the banks liabilities for the plaintiff's loss due to the bank's negligence or breach of mandate;

(b) that the letter of indemnity does not bring home to the plaintiff that by signing the letter of indemnity it is to take precautions in the general course of carrying on its business to prevent forgeries on the part of his employees;

(c) it is incumbent upon the bank if it wishes to enforce the letter of indemnity to at least advise the plaintiff to seek legal advice on the same or to inform the plaintiff of the legal effect of the same which was not done;

(d) further, the banks position that the letter of indemnity precludes the plaintiff from exercising its right to claim against the bank for any loss and damages is in contravention of s 29 of the Contracts Act; and

(e) even if the letter of indemnity is held to be valid, the bank cannot rely on it by reason of its negligence in failing to exercise good faith in honouring and making payments on the 79 LOIs.

[68] It is important to note that it was the plaintiff who had requested the bank to allow it to submits LOIs by way of fax. It signed the letter of indemnity to induce the bank to extend this facility to it. Having signed it, it must be taken to have read and understood the terms thereof. It is not suggested, and certainly there is no evidence, that the letter of indemnity was signed in circumstances in which the plaintiff did not have an opportunity of reading and considering the terms thereof. Neither is there any evidence, that the bank had refused to entertain any modification of the terms or that they had no

choice but to sign it. The plaintiff signed it and accepted it without modification. They must therefore be taken to have accepted all the terms of the letter of indemnity.

[69] The plaintiff's argument that the letter of indemnity was intended for the indemnification of the bank against third-party claims and does not exclude the banks liabilities for the plaintiff's loss due to the bank's negligence or breach of mandate is contrary to the clear and unambiguous terms in the letter of indemnity. The letter of indemnity provides:

(a) the bank 'will be in no way responsible for any misuse or unauthorised use of the message or instruction given to the bank by telephone, telex, facsimile or otherwise and that the bank shall be under no duty to enquire into the genuineness or authenticity of the messages and/or instructions contained in communication sent by any of the above means'; and

(b) TSA will 'indemnify the bank' and 'keep you (the bank) indemnified in full against all or any loss, claims, demands, costs, damages, expenses and all other liabilities, whatever which may be incurred by the bank or to which the bank may be put in consequence of the bank accepting and acting on messages or instructions received by any of the above means'.

[70] In my judgment, it is too late in the day for the plaintiff to complain that it was not brought home to the plaintiff that by signing the letter of indemnity it was to take precautions in the general course of carrying on its business to prevent forgeries on the part of its employees.

[71] The letter of indemnity is clear and unambiguous and provides that the bank is authorised and directed to act on LOIs received by fax from the plaintiff without enquiry as to the authority or identity of the person giving or purporting to give the LOIs. I can see no basis to impose a duty on the bank to advise the plaintiff to seek legal advice upon something which the plaintiff had requested and wanted the bank to do.

[72] I am also unable to agree with the plaintiff that the letter of indemnity is prohibited by s 29 of the Contracts Act as it is in effect a blanket immunity against all claims that the plaintiff may have against the bank. Section 29 reads:

> 29 Agreements in restraint of legal proceedings void
>
> Every agreement, by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights is void to that extent.

[73] In *CIMB Bank Bhd v Anthony Lawrence Bourke & Anor* [2018] MLJU 1864 the Court of Appeal explained the scope of s 24 as follows:

> We pause here to state our view on the proposition *that courts must be careful not to apply this principle where there are limitations placed on the rights and remedies of the contracting parties. In our view, limitations placed or spelt out in an exclusion clause does not offend s 29 of our Contracts Act 1950 which speaks of absolute restriction. Mere limitations and/or some restrictions added into an exclusion clause is insufficient to invoke s 29.*

[74] In order to determine whether there was an absolute restriction as the plaintiff contends, it is necessary to examine the express terms of the letter of indemnity. It states:

(a) TSA authorises the bank to reply upon and act in accordance with any of TSA's 'notice, instruction or other communication' which may be given by wat of 'telephone, telex, facsimile or any other form of electronic communication' from time to time 'without enquiry on the part of the bank as to the authority or identity of the person giving or purporting to give such notice, instruction or other communication';

(b) the bank shall be entitled to treat and rely upon the 'notice, instructions or communication' sent by TSA as duly 'authorised and binding upon' TSA regardless of the nature of the transaction or arrangement, or of the amount of money involved notwithstanding 'any error or misunderstanding or lack of clarity in the terms of such notice, instruction or other communication';

(c) the bank will not be responsible for any 'misuse or unauthorised use of messages or instructions given to the bank' by TSA 'by way of telephone, telex, facsimile or otherwise' and that the bank shall be under 'no duty to enquire into the genuineness or authenticity of the messages or instructions contained in the communication' sent by TSA; and

(d) TSA will indemnify the bank and keep the bank indemnified in full against all or any loss, claims, demands, costs, damages, expenses and all other liabilities, 'whatever which may be incurred by the bank or to which the bank may be put inconsequence of the bank accepting and acting on messages and or instructions received by any of the above means'.

[75] The terms indicate that the letter of indemnity merely seeks to exclude the liability of the bank and restrict the plaintiff from claiming loss and/or damages against the bank where it has accepted and made payments on LOIs received by way of fax. It does not exonerate the bank of liability for breach of contract and/or negligence for other breaches. As there is no absolute

restriction to the plaintiffs' right to sue the bank, the plaintiff's contention that the letter of indemnity is inapplicable is untenable.

[76] In the circumstances, it is unreasonable on the plaintiff's part to renege on its undertaking and seek to absolve itself from the consequences of not performing what it has agreed to do. I therefore hold that the letter of indemnity is valid and an enforceable contract exonerating the bank from liability for the plaintiff's losses.

Sections 24 and 73A BEA

[77] The bank also seeks to rely on the statutory defences recognised under ss 24 and 73A of the Bills of Exchange Act. Sections 24 and 73A impose a duty of care on the customer of a bank not to be negligent in the overall management of its account with the bank. See *CIMB Bank Bhd v Panaron Control Sdn Bhd* [2014] MLJU 1924; [2015] 2 MLRA 667 (CA). The statutory defences recognise that it would be unreasonable to require the bank with its commercial pressures to conduct its business on the assumption that the customer will be lax in his vigilance against fraud by an employee and he must consequently be all the more alert for it.

[78] It is common ground that the bank would be entitled to rely on these defences if the LOIs in this case are bills of exchange within the meaning of s 3 of the Act. Section 3 of the Bills of Exchange Act provides:

> A bill of exchange is an unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at fixed or determinable future time a sum certain in money to, or to the order of, a specified person, or to be bearer.

[79] It is the plaintiff's submission and I agree, that the 79 LOIs are not unconditional orders as they were all subject to the conditions in the letter of indemnity, and as such the Act will not apply. The letter of indemnity expressly provides that the LOIs are payable at the discretion of the bank.

Limitation

[80] The bank lastly contends that by reason of s 6 of the Limitation Act 1953, limitation operates to preclude the plaintiff from suing on the first seven forged LOIs.

[81] The plaintiff contends that it is entitled to postpone the limitation period under s 29(1)(b) of the Limitation Act as the fraud concerning the 79 LOIs was concealed from it and was only discovered in 2016. It says the limitation period only commenced upon the discovery of the fraud by the first

defendant, and the cause of action therefore arose only in 2016. It argues that as such imitation does not operate as the action was brought within six years of the accrual of the cause of action against the bank.

[82] Section 29(1)(b) of the Limitation Act insofar as material reads:

> Where, in the case of any action for which a period of limitation is prescribed by this Act, either ...
>
> (a) the action is based upon the fraud of the defendant or his agent or of any person through whom he claims or his agent; or
>
> (b) the right of action is concealed by the fraud of any such person as aforesaid; or
>
> (c) the action is for relief from the consequences of a mistake, the period of limitation shall not begin to run until the plaintiff has discovered the fraud or the mistake, as the case may be, or could with reasonable diligence have discovered it:
>
> Provided that nothing in this section shall enable any action to be brought to recover, or enforce any charge against, or set aside any transaction affecting, any property which ...
>
> ...

[83] Section 29(1)(b) of the Limitation Act provides for postponement of the commencement of limitation periods in cases of fraud. Section 29(1)(b) of the Act requires 'concealment by the fraud of [the defendant]'. In the instant case, as the fraud was not committed by the bank or any agent of the bank, the plaintiff's reliance on this provision is misconceived.

[84] Even if I am wrong, there is another reason why the plaintiff cannot resort to s 29(1)(b). The section requires that 'the fraud could not have been detected by reasonable diligence'. The evidence clearly show that the bank statements were accessible to the plaintiff if it had requested for and examined it (see *Lin Kai Wing & Anor v Lin Kai Lam & Ors* [2016] 4 MLJ 372). The plaintiff as the party seeking to postpone the limitation period has failed to satisfy the requirement under s 29 that it could not have discovered the fraud by the exercise of reasonable diligence.

CONCLUSION

[85] For the foregoing reasons, the plaintiff's claim is dismissed with agreed costs of RM150,000.

Claim dismissed with costs of RM150,000.

Reported by Ahmad Ismail